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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 132

HARRIET B. SAWYER,
Petitioner,

vs.

PIONEER MILL COMPANY, LTD., a corporation, C. H. SMITH, H. C. EICHELBERGER, J. E. EDNIE, H. A. WALKER, JR., M. A. PIETSCHMAN, F. W. BROADBENT, HOWARD BUTCHER, III, J. RUSSELL CADES, L. S. DILLINGHAM, J. J. JEPSON, R. R. MIDKIFF, H. V. VON HOLT,
Respondents.

Brief in Opposition to Petition for Writ of Certiorari

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 987

HARRIET B. SAWYER,

Petitioner,

vs.

PIONEER MILL COMPANY, LTD., a corporation, C. H. SMITH, H. C. EICHELBERGER, J. E. EDNIE, H. A. WALKER, JR., M. A. PIETSCHMAN, F. W. BROADBENT, HOWARD BUTCHER, III, J. RUSSELL CADES, L. S. DILLINGHAM, J. J. JEPSON, R. R. MIDKIFF, H. V. VON HOLT,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari

ADDITIONAL STATUTES INVOLVED

In addition to the statutes cited by Petitioner, the following statutes may be involved herein:

Sections 173-8, 173-19, 173-20, 173-21, 173-23, and 173-29 of the Revised Laws of Hawaii 1955 (RLH 1955). They are printed in Appendix A, *infra*, pages (i) and (ii).

QUESTIONS PRESENTED

1. Did the Court of Appeals sitting *en banc* err in holding the case was moot when: (a) The relief sought was enjoining the holding of a corporate meeting to pass on a statutory merger and the use of certain proxies thereat; (b) no stay or supersedeas was sought or obtained pending appeal; (c) the meeting was held, the proxies used, the merger approved thereat completed, and the assets transferred and commingled.

2. Will this Court, after a dismissal of an appeal on the ground that it is moot, consider, though not passed on below, the merits of the appeal?

3. Will this Court determine on the merits, the applicability of Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j) and Rule 10b-5 (17 C.F.R. 240, 10b-5) thereunder when: (a) An indispensable party, one of the parties to the merger, has not been joined and is not before the Court; (b) there has been no administrative decision that Section 10(b) and Rule 10b-5 are applicable to the statutory merger; (c) there has been no determination of impropriety or wrongdoing of any kind on the part of respondents by any court?

STATEMENT

The Petition before this Court is to review a judgment of the Ninth Circuit Court of Appeals dismissing as moot an appeal by Petitioner from a judgment of the District Court of Hawaii dismissing her complaint for lack of jurisdiction over the subject matter.

In the District Court, Petitioner, a shareholder of Pioneer Mill Company, Ltd., (Pioneer) sought to enjoin the holding of a stockholders' meeting and the use at the meeting of proxies obtained through a certain form of proxy statement, alleged to be fraudulent or misleading in viola-

tion of Section 14(a) of the Securities Exchange Act of 1934. (R. 2-8) The plan of reorganization to be considered at the meeting involved the transfer of the assets of Pioneer to a new corporation of the same name and the merger of the old corporation into American Factors, Limited. (American) (R. 13 at p. 3 of Exhibit A to Complaint) Neither the transferee of Pioneer's assets nor American has been named or added as a party respondent.

At the District Court hearing, when Respondent pointed out that its stock was not registered on any national securities exchange, Petitioner abandoned her claim under Section 14(a) and orally amended her complaint to assert as a basis for jurisdiction a violation of Section 10(b) of the same Act, and of Rule 10b-5 thereunder, without otherwise amending the facts alleged in the claim. (R. 50:23-51:2) The District Court ruled that it lacked jurisdiction over the subject matter. (R. 28, 33) Petitioner then sought to amend the prayer of her complaint to seek rescission of the merger contract, if approved at the stockholders' meeting. (R. 34, 35) The District Court refused to allow such an amendment and entered judgment dismissing the complaint. (R. 28, 33)

Petitioner did not seek or obtain from the trial or appellate court a stay or supersedeas pending appeal.

The meeting was held, the plan of reorganization approved, the assets of Respondent transferred to the new corporation, the merger executed, and the agreement of merger filed, together with the required certificate, with the Hawaii State Treasurer. (R. 87-91)

Thereupon, Petitioner having voted against the plan of reorganization, made written demand upon Respondent for the payment of the fair market value of her shares and submitted her certificates to Respondent for stamping as dissenting shares. (R. 94, 99-100) Her shares were so

stamped, and a proceeding to determine their fair market value commenced in the Circuit Court of the First Circuit, State of Hawaii. (R. 94) Under the laws of Hawaii, Petitioner thereupon ceased to have any rights as a shareholder and became merely a creditor of Respondent.

The Court of Appeals sitting *en banc* granted Respondent's motion to dismiss on the ground that the appeal was moot, since the meeting sought to be enjoined had been held, the proxies voted, and the merger approved and completed. The Court of Appeals did not pass on Respondent's alternative ground in support of its motion to dismiss as moot—that Petitioner had lost her status as a shareholder under the laws of Hawaii.

The matter was remanded to the District Court with directions to vacate its judgment and dismiss the Complaint without prejudice.

REASONS FOR DENYING THE PETITION

1. It Is an Established Doctrine of This Court That Petitions for Writs of Certiorari Should Not Be Granted Except in Cases of Gravity and Importance.

This Court will not grant a petition for certiorari merely to review the evidence and the inferences drawn therefrom, or to review the questions of anticipation and invention posed by Petitioner. *General Talking Pictures v. Western Electric Co.*, 304 U.S. 175 (1937).

The issue sought to be raised in this Court is whether there was error in the unanimous finding of nine judges of the Court of Appeals that the appeal was moot, due to the happening of certain events pending appeal. That issue presents merely a narrow point of appellate procedure, of insufficient gravity and importance to warrant the granting of the petition. *Ex Parte Woods*, 143 U.S. 202 (1892).

2. The Petition Should Be Denied Since the Appeal Was Clearly Moot.

"The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. * * *" *Mills v. Green*, 159 U.S. 651, 653 (1895). The principle of the *Green* case has been continually reaffirmed by this Court, e.g., *United States v. Hamburg-Amerikanische Co.*, 239 U.S. 466 (1916); *United States v. Alaska S.S. Co.*, 253 U.S. 113 (1920); *Local No. 8-6 v. Missouri*, 361 U.S. 363 (1960).

Here, even if a judgment affecting the finality of the merger were called for, indispensable parties necessary to the granting of such relief have not been joined. Any judgment herein could not be made effective because such a holding would adversely affect the contract rights of third parties not before this Court. See *Sobel v. Whittier Corp.*, 195 F.2d 361 (C.A. 6 1952), where the plaintiff (in a primary cause of action) sought to enjoin the merger of two corporations. Plaintiff's bill was dismissed. Defendants then completed the merger, and one corporation ceased to exist. The Sixth Circuit stated that it was unnecessary to pass on the merits of the case "because of one primary and controlling fact," that:

> "Appellant did not apply for a stay of proceedings or injunction pending appeal to this court. Her bill of

> complaint sought only that the merger be restrained. This relief would now be impossible. In order to grant relief, we would be obliged to set aside all contract rights between parties who have never been before the court. * * *" (at p. 363)

In *Kelaghan v. Industrial Trust Company*, 211 F.2d 134 (C.A. 1 1954), an injunction against consolidation of two banks was sought. The complaint was dismissed. Plaintiff, though filing notice of appeal, did not seek a stay or supersedeas. Pending appeal, the consolidation was completed and the assets transferred. The appeal was dismissed as moot, and the complaint below dismissed without prejudice.

In *Fink v. Continental Foundry & Machine Company*, 240 F.2d 369 (C.A. 7 1957), minority stockholders sought to enjoin a sale of corporate assets, but did not join the prospective purchaser of the assets as a defendant. Upon the District Court's dismissal of the suit, the assets of the corporation were sold, and the selling corporation's liquidation commenced. The court held that the appeal should be dismissed as moot, stating that:

> "The general law, as well as the law in this circuit, has long been established that if pending an appeal an event occurs which renders it impossible for the appellate court to grant any relief or renders a decision unnecessary the appeal will be dismissed. * * *"

The court cited, *inter alia*, *Mills v. Green*, 159 U.S. 651 (1895), and discussed the qualifying phrase in the rule set out in the *Mills* case: That the appeal must have become moot "without any fault of defendant." It found no fault in the fact that defendant had sold its assets, stating that:

> "It is true that it was by the act of Continental that the assets were transferred out of the jurisdiction of

the court and the liquidation accomplished but Continental did only that which it had a right to do. It was under a contract to sell its assets to Blaw-Knox on the day the sale and transfer was made. Earlier the same day the court had refused to enjoin it from selling and dismissed the suit. After the case had been tried on its merits and permanent injunction denied with dismissal of the complaint for want of merit Continental was free of restraint. If plaintiffs desired that the status quo be maintained pending appeal means were afforded in proper case by Rule 62, F.R.C.P., as heretofore pointed out. Plaintiffs failed to seek such protection. The appeal was not taken until twelve days after the judgment and then no stay was sought. In the meantime the assets of Continental had passed from the court's jurisdiction by the act of Continental without fault on its part. * * *

"* * * the appeal has become moot and must be dismissed. * * *" (at 375)

It is thus clear that the Ninth Circuit Court of Appeals was correct in finding that the appeal herein was moot, due to the completion of the corporate actions sought to be enjoined prior to the hearing of the appeal.

3. Even if the Grounds Relied Upon by the Court of Appeals for Its Action Were Erroneous, the Appeal Was Nonetheless Moot on the Secondary Ground Asserted Before That Court—That Petitioner Had Lost Her Status as a Stockholder, and No Longer Had Standing to Maintain the Action.

It has long been the rule of this Court that, "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason. [citing many cases.]" *Helvering v. Gowran*, 302 U.S. 238, 245 (1937).

Hawaii law provides that upon a demand by a dissenting stockholder to be paid the fair market value of her shares, a stamping of those shares as dissenting shares, and commencement of an action to determine the fair market value thereof, the former shareholder loses all the rights and privileges of a shareholder. (RLH 1955, Sections 173-19 to 21, 23).

Further, Hawaii statute (RLH 1955 § 173-29) expressly limits a stockholder's right to litigate with respect to a merger to the prescribed statutory action to determine fair market value of the dissenter's shares, with certain exceptions not here applicable.

Therefore, Petitioner's right to maintain this suit ceased upon the completion of the above-mentioned actions. The Hawaii law, in effect at the time Petitioner became a shareholder, should not be set aside merely because an otherwise valid statutory provision does "not appeal to the conscience of a court of equity". *Ramsberg v. American Investment Company*, 231 F.2d 333 (C.A. 7 1956). Rather, such statutes, unless unconstitutional, must be sustained. See *Beachwood Securities Corporation, Inc. v. Associated Oil Company*, 104 F.2d 537 (C.A. 9 1939); *Skelly v. Dockweiler*, 75 F. Supp. 11 (S.D. Cal. 1947). See also *Nerlett v. Carpenter*, 305 U.S. 297 (1938); *Willson v. Waltham Watch Co.*, 293 Fed. 811 (D. Mass. 1923).

4. The Petition Should in Any Case Be Denied as Premature, Since the Merits of the Substantive Issues Have Never Been Passed Upon by the Court of Appeals.

"'A Federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it.' [citations]" *Amalgamated Ass'n. v. Wisconsin Emp. Rel. Bd.*, 340 U.S. 416, 418 (1951).

This cause was argued three times before in the Ninth Circuit, the third time to the court sitting *en banc*. This Court should not pass on the merits of the question presented to the Court of Appeals when that Court has not ruled thereon.

5. The Petition Should Be Denied Since There Has Never Been a Decision That Section 10(b) and Rule 10b-5 Are Applicable to the Statutory Merger.

Dann v. Studebaker-Packard Corporation, 288 F.2d 201 (C.A. 6 1961), held, in a suit under § 14(a) of the Securities Exchange Act, which, since it deals specifically with proxy solicitations, sought here to be brought under the more general coverage of § 10(b), certainly cannot be narrower than § 10(b), that there is no federal right to follow assets into a corporation not a party to the suit before the court. As stated therein:

> "* * * [W]e * * * hold that we are without jurisdiction to grant the relief sought in this complaint insofar as it seeks to rescind corporate transactions already consummated because of allegedly improperly solicited proxies. In reaching this decision, we are deciding that federal jurisdiction must end with the holding of a contested proxy election, that the right created by Section 14(a) of the Exchange Act is only broad enough to permit consideration of the *validity* of the proxies solicited in violation thereof, but it is not broad enough to permit the federal courts to determine the consequent *effects* of the validity or invalidity of said proxies. This latter determination raises issues which concern matters of local law alone. In our opinion, this is the cleanest joint at which to amputate the long arm of federal law in this area." (emphasis by the court) (at p. 214.)

6. The Petition Should Be Denied Since the Decision of the Ninth Circuit Vacating the Judgment Below and Dismissing the Appeal Was Without Prejudice.

It is clear that any question concerning alleged federal rights of Pioneer's shareholders to attack the merger, as a result of allegedly fraudulent or misleading proxy statements, may be tested upon the commencement of a new action joining the proper parties. *Dann v. Studebaker-Packard Corporation*, 288 F.2d 201 (C.A. 6 1961). The action of the Ninth Circuit was correct. See the instructions given the Circuit Courts in *United States v. Munsingwear*, 340 U.S. 36 (1950).

7. If the Court Reviews the Case on the Merits It Should Affirm the Decision of the District Court, Because:

(a) THE MERGER DID NOT INVOLVE A PURCHASE OR SALE OF SECURITIES.

The administrative construction of both the Securities Act of 1933 and the Securities Exchange Act of 1934, for the seventeen years immediately following the enactment of the latter Act, which created the Securities and Exchange Commission, was that a statutory merger does not involve a "sale". While that interpretation was of the meaning of "sale" under the provisions of Sections 12(2) and 17(a) of the Securities Act of 1933 (15 U.S.C., §§ 77(1)(2), 77(q)(a)), the provisions of the 1934 Act were modelled upon those of the 1933 Act, and are substantially identical. There is therefore no basis for a different conclusion under the 1934 Act.

In *National Supply Co. v. Leland Stanford Jr. University*, 134 F.2d 689 (C.A. 9 1943), the S.E.C. argued, in a brief filed as *amicus curiae*, that a statutory merger or consolidation does not involve a sale because it does not involve a voluntary exchange or transfer of securities by the individual shareholder, but merely involves a conver-

sion of his security from one form to another by corporate action. The S.E.C. argued that since such corporate action bound all stockholders, assenters, dissenters, and non-voters alike (subject only to appraisal rights of dissenters) the transaction therefore lacked the prime elements of every contract, and hence of any "sale" as defined in the Act—offer and acceptance. The court held in accordance with the S.E.C.'s argument.

The 1934 Act definition of "sale" should not vary from that of the 1933 Act, from which it and its implementing regulations were virtually copies. See *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461, 464 (C.A. 2 1952), *cert. den.* 343 U.S. 969.

The expressed purpose of the 1934 Act clearly indicates that Section 10(b) was not intended to apply to statutory mergers. Section 2 of the 1934 Act (15 U.S.C. § 78(b)) states that enactment was grounded on the necessity for regulation of "transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets." See *Fratt v. Robinson*, 203 F.2d 627, 630, 631 (C.A. 9 1953). Statutory mergers do not involve any security transaction of a kind ever conducted on securities exchanges or over-the-counter markets.

The fact that proxy solicitations, including those in connection with a proposed merger are specifically regulated by Section 14(a) of the 1934 Act indicates that no such regulation was intended by Section 10(b). As stated with reference to an exactly analogous question in *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461, at 464 (C.A. 2 1952):

> "When Congress intended to protect the stockholders of a corporation against a breach of fiduciary duty by corporate insiders, it left no doubt as to its meaning. Thus Section 16(b) of the Act of 1934, 15 U.S.C.A. § 78p(b), expressly gave the corporate issuer or its stockholders a right of action against corporate in-

siders using their position to profit in the sale or exchange of corporate securities. The absence of a similar provision in Section 10(b) strengthens the conclusion that that section was directed solely at that type of misrepresentation or fraudulent practice usually associated with the sale or purchase of securities rather than at fraudulent mismanagement of corporate affairs * * *"

The contemporaneous administrative interpretation of the definition of "sale" in the "Note" to Rule 5 under the 1933 Act, prior to 1951, specifically stated that a statutory merger or consolidation does not involve a "sale", as that word was used throughout the Act. See the historical recital, particularly footnote 2, in *Matter of E. I. duPont De Nemours and Company*, 34 S.E.C. 531 (1953). The fact that, some seventeen years later, in 1951, the S.E.C. reversed its administrative interpretation of the statute is entitled to no weight whatever. *United States v. Leslie Salt Co.*, 350 U.S. 383 (1956). As said in that case of a similar administrative reversal:

> "Against the Treasury's prior longstanding and consistent administrative interpretation its more recent ad hoc contention as to how the statute should be construed cannot stand. Moreover, that original interpretation has had * * * implied congressional acquiescence * * * through Congress having let the administrative interpretation remain undisturbed for so many years." (at 396-397)

Further, since Section 10(b) is a penal statute, punishable by a fine of $10,000 or two years in prison (Section 32(a)), it should be strictly construed. *U.S. v. Morris*, 14 Pet. (39 U.S.) 464 (1840); *American Fur Co. v. U.S.*, 2 Pet. (27 U.S.) 358 (1829); *Yates v. U.S.*, 354 U.S. 298 (1957); *Smith v. U.S.*, 233 F.2d 744 (C.A. 9 1956). Thus the

word "sale" should not be contorted beyond its ordinary and usual meaning to embrace a conversion of stock from one form to another by corporate action incidental to a statutory merger.

(b) RULE 10b-5 WAS NOT INTENDED TO APPLY TO A STATUTORY MERGER OR CONSOLIDATION.

Section 10(b) is not self-executing. An implementing regulation sought to be made applicable here, Rule 10b-5, was issued in 1942 and has never been changed. At that time, and for nine years thereafter, the Commission itself did not regard a statutory merger as involving a "purchase or sale of securities" for any of the purposes of the Act. Thus, even if Section 10(b) should give the Commission regulatory power over statutory mergers, Rule 10b-5 was not intended to implement that power and thus that power remains unexercised.

(c) ASSUMING A SALE TO HAVE BEEN INVOLVED, IT NEVERTHELESS DOES NOT FOLLOW THAT SECTION 10(b) CREATES A FEDERAL RIGHT OF ACTION TO VACATE A STATUTORY MERGER.

Petitioner claims the proxy statement was misleading, but does not claim that she was in fact misled, nor does she allege any damages. A defrauded seller of securities may have the right to seek redress in damages in Federal Court, see *Fratt v. Robinson*, 203 F.2d 627, 631-632 (C.A. 9 1953), but no court has yet held that a right of action is created for a person who has not himself been defrauded. It is clear that the cause of action brought by Petitioner, if it exists, is individual, not derivative. *Howard v. Furst*, 140 F. Supp. 507 (S.D. N.Y. 1956), *aff'd.* 238 F.2d 790; *cert. den.* 353 U.S. 937. Thus, since Petitioner alleges no individual damages and does not allege that she was herself misled, she cannot maintain a cause of action under Section 10(b), even if that Section was intended to create such a Federal right.

However, it seems clear that Section 10(b) was not intended to create a Federal right of action to vacate a statutory merger. *Dann v. Studebaker-Packard Corp.*, 288 F.2d 201 (C.A. 6 1961) is squarely in point (see the quotation on page 12, *supra*). While that case dealt with the effect of Section 14(a), it surely cannot be true that Section 10(b), assuming that it also applies to proxy solicitations, has a broader effect. There, the plaintiff sought to set aside corporate action taken pursuant to a vote of stockholders in connection with which there had been misleading proxy solicitations. The court denied the relief sought. See also *Howard v. Furst*, 140 F. Supp. 507 (S.D. N.Y. 1956) *aff'd.* 238 F.2d 790; *cert. den.* 353 U.S. 937, where the court stated that:

> "There is no basis in the statute or its legislative history for an implication that Congress intended to give an individual stockholder, as an incident of his protection by proxy statement regulations, the right to rescind completed corporate transactions whenever based upon votes solicited by such statements, or the right to enforce the corporation's claim for waste. The drastic nature of such relief and the ease with which it could have been expressly authorized if Congress had so intended all argue against such implication.
>
> "Even assuming that, under Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 and Fielding v. Allen, 2 Cir., 181 F.2d 163, certiorari denied, Ogden Corp. v. Fielding, 340 U.S. 817, 71 S.Ct. 46, 95 L.Ed. 600, plaintiff might recover under the federal statute for the loss of his opportunity to vote or to withhold consent to the sale, he did not lose these rights. He was not misled himself by the proxy statement. On the contrary, he started this action before he voted. He can only rely upon some claim that the proxy statement so corrupted the notice of the shareholders' meeting that there was non-compliance with the New York law, in

effect no submission of the question to the stockholders, including himself. This, however, would present a claim for violation of state rather than federal law. The claim would turn upon the interpretation of the state law not the federal. The questions of fact and law would be the same even though the federal statute had never been enacted. Under such circumstances the claim would not arise under the laws of the United States." (at 513)

Thus, neither the casting of votes at a corporate election nor the action taken by the corporation pursuant thereto gives rise to a Federal cause of action to set aside the effects of the validity of the proxies used at the corporate meeting.

The mere fact that the district courts have been given exclusive jurisdiction of suits "to enforce any liability or duty created by" the Act. (Section 27, 15 U.S.C., Section 78aa) does not mean that a state court in a suit under state law to vacate the merger could not pass upon the question whether the proxy solicitation violated the Federal act. "There is a clear distinction between a case and a question arising under" a Federal statute. *Pratt v. Paris Gaslight and Coke Company*, 168 U.S. 255, 259 (1897).

(d) ASSUMING A SALE TO HAVE BEEN INVOLVED THE COMPLAINT NEVERTHELESS DOES NOT ALLEGE A VIOLATION OF SECTION 10(b).

The facts in the case show that the proxy statement contained no misleading or untruthful representations. A comparison of the proxy statement with the various allegations of untruths or "half-truths" made by Petitioner in her complaint and the facts will show that Section 10(b) has not been violated. While there were or might have been further facts not included in the proxy statement that might have

been of interest to some stockholders, Rule 10b-5 does not require that every fact known about a stock that a prospective purchaser might like to know, or that might, if known, tend to influence his decision, be stated by the seller. *Otis & Co. v. Securities and Exchange Commission*, 106 F. 2d 579, 582 (C.A. 6 1939) and see III Loss, *Securities Regulation*, 1439 (2d Ed. 1961). All that the Act does is forbid the making of untrue statements of material facts or statements that in the light of the circumstances might be misleading.

(c) PETITIONER, HAVING YIELDED HER STATUS AS A SHAREHOLDER, IS WITHOUT STANDING TO MAINTAIN AN ACTION TO VACATE THE MERGER, EVEN IF FEDERAL LAW CREATES SUCH A RIGHT.

As pointed out, *supra*, pages 9 and 10, once Petitioner had elected as a dissenting shareholder to receive the cash value of her shares, and the various statutory steps completed, Petitioner lost the rights and privileges of a shareholder. Revised Laws of Hawaii 1955, Section 173-21. Petitioner was not bound to make such election, and, had she not so elected, all of her rights as a shareholder would have continued. Having made that election, however, under a state statute in full force and effect at the time she became a shareholder of respondent, whatever right she might otherwise have had to maintain this suit ceased.

Petitioner is therefore no longer a shareholder of either of the constituent corporations or of the surviving corporation. Even assuming that a shareholder would have a right of action under Section 10(b) to vacate the merger, certainly a mere creditor has no such right of action.

CONCLUSION

The Petition for Writ of Certiorari should be denied since: (1) the question sought to be raised is not of suffi-

cient gravity and importance to warrant the issuance of the Writ; (2) the appeal involved is clearly moot since the actions sought to be enjoined have been completed; (3) the appeal is also moot since Petitioner no longer is a stockholder of respondent; (4) the case is premature since the merits of the substantive issues have never been passed upon by the Court of Appeals; (5) there has never been a decision that Section 10(b) and Rule 10b-5 are applicable to the statutory merger; (6) the merits would require affirmance of the District Court since there was neither a purchase nor sale of securities, since Regulation 10b-5 was not intended to apply to a statutory merger, since Section 10(b) does not create a Federal right of action to vacate a statutory merger, since Petitioner does not allege that she was misled or damaged, and since Petitioner is without standing as a stockholder and thus cannot maintain such a cause of action, even if it exists.

Respectfully submitted,

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(Appendix Follows)